

CWA 404 ASSUMPTION RULEMAKING AND ACTIVITIES

Background:

- The EPA established a Federal Advisory Committee Act (FACA) subcommittee in 2015 to provide recommendations on how the EPA could clarify which waters states and tribes may assume under CWA Section 404(g) for purposes of issuing dredged or fill permits. The recommendations were submitted to the Administrator in June 2017.
- States and tribes have cited various reasons for not assuming the program including: lack of dedicated federal funding for CWA 404(g); inconsistency between state and federal authorities; lack of partial assumption authority; and lack of clarity on which waters of the United States the Corps retains.
- In August 2018, the Assistant Secretary of the Army for Civil Works issued a memorandum to the Corps clarifying which waters states and tribes may assume under the federal Clean Water Act, which is consistent with the subcommittee's majority view regarding retained waters.

Key Points:

- Congress gave states and tribes the authority to assume the CWA Section 404 dredged and fill permitting program for certain waters within their state/tribal boundaries. Under Section 404(g) the EPA approves state and tribal requests to assume the program.
- Since the CWA was enacted, just two states, Michigan in 1984 and New Jersey in 1994, have assumed the CWA Section 404 program.
- In response to input from states and tribes, the Agency initiated a rulemaking to revise our 1988 regulations to clarify and modernize the regulations. The EPA is considering a variety of updates to the 1988 regulations including how partial assumption could be implemented. Partial assumption could involve geographic regions of a state, types of waterbodies, or types of activities (e.g., roads)
- As part of the rulemaking process, the agencies engaged in tribal consultation which provided tribes an opportunity to submit pre-proposal comments between October-December 2018. In addition, the EPA held an in-person meeting with states in early December 2018 and states may submit recommendations until February 6, 2019.
- The 2018 Fall Regulatory Agenda indicates that the Agency will propose a rule in February 2020; we are in the process of considering pre-proposal input and developing options for the policy issues under consideration for the proposed rule.
- Based on interest expressed in 2018 about the possibility of partial assumption of transportation projects, the EPA has reached out to Nebraska DEQ for further discussions. We have not received a response to date.